Supreme Court of the United States.

OCTOBER TERM, 1945.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Petitioners,
v.
WILLIAM E. HURLEY (SUBSTITUTED FOR MERRITT THOMPSON, COLLECTOR OF TAXES),
Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

I.
Opinions of the Courts Below.

The memorandum of the District Court of June 14, 1944, is set forth in Record 4030, pp. 20-27. The order of the District Court dated January 31, 1945, appealed from is set forth in the Record, p. 6, and the opinion of the Circuit Court of Appeals for the First Circuit dated November 7, 1945, is set forth in the Record at pages 13 to 25, inclusive.

II.
Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under United States Code, 1940 Edition, Title 28, sec. 347.

III.
Statement of the Case.

On June 22, 1944, the District Court ordered that the Clerk pay forthwith to the respondent from part of the money deposited in the registry of the Court on August 21, 1943, for or on account of the just compensation to be awarded for the condemnation of the interest in land taken, the sum of $19,998.09, "together with interest at the rate of $2.12 per day from May 15, 1944, to the date of payment" (Record 4030, p. 19). The amount of said deposit was $40,000 (Record 4030, p. 14).

On June 30, 1944, the petitioner John Hancock Mutual Life Insurance Company appealed from said order (Record 4030, p. 30) and filed with the Clerk a supersedeas bond in the sum of $1000 as principal with the petitioner Fidelity and Deposit Company of Maryland as surety (Record, p. 2), and subsequently the appeal was dismissed with costs of $20 to the appellee. After issuance of the mandate and on December 29, 1944, the Clerk paid to the respondent the sum of $20,095.61, being said sum of $19,998.09 specified in said order June 22, 1944, together with interest at the rate of $2.12 per day from May 15, 1944, to June 30, 1944, only when said supersedeas bond was filed (Record, pp. 5 and 10) instead of to date of payment.

On January 4, 1945, the respondent filed motion for summary judgment against the petitioners, principal and surety, respectively, on the aforesaid bond (Record, p. 3). This motion was heard upon oral arguments of counsel and on January 31, 1945, judgment against the petitioners in the amount of $604.39 was entered, computed as set forth in petitioners' narrative statement, being interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment), together with the costs of $20 taxed by the Circuit Court of Appeals

against the petitioners pursuant to its mandate dismissing said appeal (Record, p. 10). The District Court denied the petitioners' motion for leave to deposit with the Court said sum of $20 admittedly due to the respondent. The petitioners appealed from the judgment against them entered January 31, 1945, excepting that part thereof with respect to said $20.

The petitioners by their appeal to the Circuit Court of Appeals challenged the judgment of the District Court on the grounds that it was based upon an improper construction of the supersedeas bond and of Federal Rules of Civil Procedure, Rule 73 (d), (e), an improper construction of the order of the District Court dated June 22, 1944, and an improper interpretation of Federal Rules of Civil Procedure, Rule 73 (f), and, if so construed, said rules were invalid in that they violated the Seventh Amendment of the Constitution.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the United States Code, 1940 Edition, Title 28, sec. 347.

IV.

Specification of Errors.

The Circuit Court of Appeals erred—

1. In ruling that an order for the payment of money out of a condemnation fund is to be paid within ten days from said order under Federal Rules of Civil Procedure, Rule 62, contrary to the specific provision in Federal Rules of Civil Procedure, Rule 81 (7), that Federal Rules of Civil Procedure do not apply to proceedings in eminent domain except as to appeals.

2. In failing to rule that, pursuant to the Conformity Act of 1872, sec. 5; Mass. Gen. Laws (Ter. Ed.) c. 231, sec. 96, providing for twenty-day period, not ten as under Federal Rules for Civil Procedure, does not apply.

3. In ruling that Federal Rules of Civil Procedure, Rule 73 (d) and (e), is substantially different from Supreme Court Rule 36, formerly Supreme Court Rule 29, now numbered 36 in the Revised Rules of the Supreme Court of the United States.

4. In ruling that, after mandate by the Circuit Court of Appeals affirming the money judgment against the fund in the custody of the District Court, the District Court may add interest other than interest ordered originally.

5. In ruling that Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), permits making a principal on a supersedeas bond a party defendant in proceedings for summary judgment.

For a further statement of the errors alleged to have been omitted by the District Court and which the Circuit Court of Appeals by its opinion and order affirmed see Statement of Points (Record, p. 9).

V.
Argument.

The judgment of the District Court awarding appellee payment of its claim for taxes out of the fund was affirmed by the Circuit Court of Appeals with costs in the sum of $20. The mandate of that Court affirming the judgment of the District Court did not give the District Court power to change the judgment entered originally by it by adding interest other than the interest ordered originally. Without order from the Circuit Court of Appeals the District Court had no power to add to or detract from the judgment affirmed by that Court.

Rosenstein v. *Tarr*, 51 Fed. 368; affirmed, 53 Fed. 112.

Clark v. *Hot Springs Electric Light & Power Company*, 76 Fed. (2d) 918.

In *Rosenstein* v. *Tarr, supra,* at page 370, the Court says:

> "There is no doubt that a supersedeas bond conditioned according to the statute for prosecuting an appeal with effect and answering all damages and costs covers not merely compensation for delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. . . .
>
> "It appears that there has been no judgment nor decree by either tribunal, directing payment of any interest, or other damages for delay, with reference to the amount in the registry of the court. It is elementary that in a suit on a supersedeas bond neither the principals nor the sureties can be mulcted beyond what the courts have adjudged as the result of the appeal to which the bond was incident. . . .

Interest as part of the original judgment was fixed at $2.12 per day until paid, which is 4% interest as provided in the statute.

Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57.

But here the District Court has sought to accomplish indirectly that which it could not accomplish directly. It has increased the interest awarded to the City upon its taxes from 4% to 6% and it has further found the appellant John Hancock Mutual Life Insurance Company and the appellant Fidelity and Deposit Company of Maryland, surety on the bond, liable for interest for which no liability against the principal appellant John Hancock Mutual Life Insurance Company existed by virtue of the judgment appealed from or the mandate dismissing the appeal.

The appeal bond and the motion for judgment on the bond were filed under the provisions of Rule 73 (d) and (e),

which rule is substantially the same as Circuit Court Rule 37 and Supreme Court Rule 36, formerly Supreme Court Rule 29. The present Rule 73 is based upon and was taken from the former Supreme Court Rule 29, now numbered 36 in the Revised Rules of the Supreme Court of the United States.

The precise point here in issue was early determined in *Jerome* v. *McCarter,* 21 Wall. 17, and in *Supervisors* v. *Kennicott,* 103 U.S. 554, by decisions construing Rule 29. A supersedeas bond is not an obligation to pay damages, interest and costs, but is an obligation to indemnify against loss which may result to the obligee on account of such items by reason of the appeal. In *Jerome* v. *McCarter,* 21 Wall. 17, it was held that the rule did not require security for the payment of all the accumulations of interest on the debt pending the appeal, but only indemnity against loss of such accumulation. There the Court said: "The object is to provide indemnity for loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest."

In *Supervisors* v. *Kennicott* the Court refused to allow recovery of accumulated interest in an action on the bond, on the ground that the loss of interest was not sustained by reason of the appeal. The mere existence of the right to receive interest during that period is not sufficient to justify recovery of the accumulated interest by way of damages in an action on the bond. The mere fact that the claimant has not recovered such interest is not sufficient.

Supervisors v. *Kennicott,* 103 U.S. 554.

The proof must be that he has lost the accumulated interest and has suffered damage to that extent as a result of the delay incident to the appeal.

The judgment dated June 22, 1944, appealed from provided that interest at the rate of $2.12 per day should be

paid from the fund in the registry of the Court from May 15, 1944, to the date of payment. This judgment was affirmed by the Circuit Court of Appeals. By the express language of that judgment the appellee is entitled to receive from the fund interest to the date of payment at $2.12 per day, and, being so entitled, the appellee has suffered no loss by reason of the appeal. The judgment also provided that "such disbursement being without prejudice, to the right to the City of Boston or the Collector of Taxes for the City of Boston to claim further and additional damage for the condemnation of the interest in land taken in the above-entitled proceedings." Even if the decree did not give the Collector of Taxes the right to recover $2.12 to the date of payment and if that right was cut off upon the filing of the supersedeas bond, the right was reserved to the City to make further and additional claim against the condemnation fund. It is also to be noted the appellee claims a lien for its taxes until they are paid in full with interest, which lien includes its charges for interest (Mass. Gen. Laws (Ter. Ed.) c. 60, sec. 37), and the lien may still be enforced against the land and interest therein not taken in the condemnation proceedings. Until it appears that the appellee will be unable to recover the interest by enforcing its lien it has suffered no loss.

Error in Computation.

Even if the appellee was entitled to receive, as damages for the delay caused by the appeal, interest on the moneys withheld because of the appeal, the District Court has erred in the computation of that interest. His right to recover damages is limited to his loss. His loss cannot exceed what he was entitled to receive, to wit, interest at the rate of 4% (Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57), but the District Court has awarded interest at the rate of 6%. United

States Code, Title 28, sec. 811, and the Rules of the Circuit Court of Appeals for the First Circuit, Rule 33 (also see Moore's Federal Practice, page 93), provide that interest shall be allowed on judgments at such rate as is allowed by law on judgments recovered in the courts of such state. Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57, provides that taxes shall bear interest at the rate of 4%. With respect to interest, Mass. Gen. Laws (Ter. Ed.) c. 107, sec. 3, provides: "If there is no agreement or provision of law for a different rate, the interest of money shall be at the rate of six dollars on each hundred for year . . ." The 6% rate ordinarily applied in Massachusetts and consequently ordinarily applied by the Federal Court does not apply to the present case. A different rate is provided by law.

Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57.

Error in Making Principal a Party in Summary Proceedings.

The Court has awarded judgment against John Hancock Mutual Life Insurance Company in summary proceedings imposing a liability for interest where no liability previously existed. This summary judgment has been entered under the provisions of Rule 73 (f). It is to be noted that Rule 73 (f) provides only for a summary judgment against the surety on the bond and makes no provision for summary judgment against the principal on the bond. This remedy provided by Rule 73 is in addition to the obligee's other remedies on the bond. He could sue both the principal and the surety in an action of contract on the bond. There existed no reason for providing an additional remedy against the principal on a bond, for the reason that, if the principal were liable for damages, costs and interest, that liability could be enforced in the main proceedings to which the summary proceedings are merely ancillary. If the appellee had been entitled to

recover any sum from the appellant John Hancock Mutual Life Insurance Company by reason of its petition or by reason of the appeal, an order therefor could have been entered against said appellant on the original judgment appealed from or by direction in the mandate from the Circuit Court of Appeals. Rule 73 permits summary proceedings against the surety only, for the reason that the liability, if any, existing against the principal is established in the main proceedings. There are other equally valid reasons for such limitation. If the principal on the bond were to be held liable in summary proceedings, danger arises that there might be two judgments and two executions issued against the principal for the same cause. Any judgment apart from costs entered in summary proceedings must be limited to the amount of the judgment in the main proceedings for the reason that the summary proceedings are merely ancillary to and in aid of the main proceedings. The summary proceedings are not to be availed of for the purpose of enforcing new, additional or different substantive claims, but are to be availed of only for the purpose of enforcing the judgment entered in the proceedings to which it is ancillary. Serious constitutional questions relating to due process and trial by jury would arise if the ancillary proceedings were permitted to go beyond the scope of the main proceedings. The procedural defect in this case is a result of an attempt to do that indirectly which the District Court lacked authority to do directly, and confirms the lack of substantive right. It would be rather difficult to convince a court that liability should be imposed upon a surety when no such liability had been imposed upon the principal, thus the necessity existed of finding some means by which liability could be imposed upon the principal, so the principal was added as a party in the summary proceedings when no authority existed therefor. Remove the principal from the summary proceedings and the want of power in the

Court to enter the summary judgment appealed from becomes apparent.

Summary.

Because—

(1) there exists a question as to the interpretation of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), of great importance, fundamental to the prosecution of appeals where supersedeas bonds are given, including a violation of Federal Rules of Civil Procedure, Rule 81 (7), and

(2) there exists a serious question as to the constitutionality of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) as applied in the present case, and

(3) there exists a confusion and diversity of opinion as to the proper interpretation of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) evidenced by the apparent conflict of opinion of the various circuit courts of appeals, and

(4) there has been a misinterpretation or improper application of decisions of the Supreme Court by the Circuit Court of Appeals, in the present case—

there is presented a case which ought to be reviewed by this Honorable Court.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors of the Circuit Court of Appeals for the First Circuit may be corrected, and in order that there may be an authoritative decision on supersedeas bonds under Federal Rules of Civil Procedure, Rule

73 (d), (e) and (f), and in order that there may be an authoritative decision as to the constitutionality of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) as applied to the rights of sureties on supersedeas bonds respecting summary judgments against their principals, and to such an end a writ of certiorari ought to be granted, and this Court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

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INSURANCE COMPANY,
By its Attorney,
G. K. RICHARDSON.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By its Attorney,
G. K. RICHARDSON.